88-143

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE CITY OF PHILADELPHIA, and
JAMES STANLEY WHITE, in his capacity as
MANAGING DIRECTOR, and
WILLIAM J. MARRAZZO, in his capacity as
WATER COMMISSIONER,

Petitioners,

v.

CONCERNED CITIZENS OF BRIDESBURG, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SEYMOUR KURLAND, CITY SOLICITOR
A Member Of The Bar Of This Court
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Counsel for Petitioners.

QUESTIONS PRESENTED

1. Whether the action of an administrative agency, which the agency admits contravenes its statutory mandate, can provide the basis for federal subject matter jurisdiction in a citizen enforcement suit under the Clean Air Act?

2. Whether the District Court, after the merits trial, can, *sua sponte,* assert subject matter jurisdiction based on the common law of nuisance when there exists no substantial federal claim and where no such pendent state claim had been alleged by plaintiffs?

3. Whether the District Court can employ equity, in a case decided on common law nuisance, to do that which is specifically prohibited by the Pennsylvania Political Subdivision Tort Claims Act?

4. Whether a District Court can assess compensatory damages, where the court itself admits there is no evidence of damages?

LIST OF PARTIES

The parties to the proceedings before the United States Court of Appeals for the Third Circuit were appellants, the City of Philadelphia, James Stanley White, in his capacity as Managing Director; and William J. Marrazzo, in his capacity as Water Commissioner; and appellees, the Concerned Citizens of Bridesburg; James Coppola; Robert Kumosinski; Mia Ptak; Kathleen Coppola; Harry Hagendey; Kathleen Hagendey; Elizabeth Rickey; Frances Pfeiffer; Joseph Pfeiffer; Edward Ludigan; Anthony Les; Ethel R. Mitchell; Charles A. Finnegan; Michael Butler; Al Lewandowski; Linda Lewandowski; Karen Dylinski; Charles H. Combs; Ethel Marinuk; Karen Arenweh; Cecilia Pawlowska; Delores Short; Vincent Dombrowski; Barbara Lynn Portoni; Mary Elton; Ruth C. Groff; Anna-May Burns; Edna Donachie; Edna Kingston; Dennis J. Foster; Kelly Charlton; Mark D. Haug; Tillie Piergrossi; Joe Larsen; Sue Larsen; John Waters Auto Sales; Rich Sileo; Agnes Antonelli; Albert Mantici; Robert J. Portone; Thelma Schmidt; Betty Long; Mark Fronceh; Toni Francek; Bill Conceptal; Del Conceptal; Linda Wolk; Clair Fern; Pearl McGovern; Louis Kozlowski; Gelwin Pusicz; Joyce Ripso; Stacey Southerland; Tina Auerweck; Elizabeth Auerweck; Ernest Marinuk; T. Yodin; Cynthia Moscicki; James O. Respo; Marie Gorski; Florence James; Joel James; Angel Romer; Stephanie Novak; Nellie Novak; Sue O'Donnell; Bill O'Donnell; Edward Pihala, Sr.; John McLaverty; Bennett Hill; Anthony Calo; C. William; Robert Flanagen; Bobby Rekala; Maureen Kumosinski; Anna M. Pawloski; Stanley M. Pauloski; Michael M. Lisicki; Linda A. Lisicki; Emily Kumosinski; Nancy McMaster; Frank Kumosinski; Andy Palka; Amey E. Howard; Katherine Coppola; Josephine Gordon; Anna Konopka; Arlene Kurpaska; John Pendergrast; Betty Pendergrast; Phil Lerman; Esther Lerman; Linda Flynn; Virginia Wagner; Pauline James; Justine Hayes; Peter Bingel; Joan Bingel; Michael Parcale; Helen Mason; Florence Peoccaineri; William Malloy; William R. Hood; Herb Rorenberger; William Moronese; Jack Renfe; Perry M. Smith; John

Svitak; John Atkinson; Michael H. Stark; Wendy Prince; Delores Berger; Stanley Berger; Betty Higham; Mary Lucy Collins; Ronnie Kirby; Mary Gogoj; William Melley; Ellen Casey; Sharon Gibson; Lise Cuich; Linda Froncek; Rita Palka; Jacqueline Parttezzia; Walter Kozlowski; Christina Serpico; Eleanor McKinley; Stephie Byrme; Shen Turner and Mary Yoder.

In the proceedings before the United States District Court for the Eastern District of Pennsylvania, the parties included two additional entities: Rohm & Haas Corporation and Allied Corporation, defendant-intervenors. At the time the suit was commenced Leo A. Brooks was Managing Director. In addition the Philadelphia Water Department was dismissed as a plaintiff in the District Court.

The respondents before this Court include those named above as appellees in the proceedings before the United States Court of Appeals for the Third Circuit.

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Petitioners, the City of Philadelphia, James Stanley White in his capacity as Managing Director, and William J. Marrazzo in his capacity as Water Commissioner, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on March 31, 1988, rehearing denied April 25, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 843 F.2d 679 (3d Cir. 1988), and is reprinted in the appendix hereto, p. A-1, *infra.*

The January 28, 1987 Memorandum Opinion and Order of the District Court (VanArtsdalen, J) has not been reported. It is reprinted in the appendix hereto. p. A-12, *infra.*

The July 25, 1986 Memorandum opinion and order of the United States District Court for the Eastern District of Pennsylvania (VanArtsdalen, D.J.) is reported at 643 F.Supp. 713 (E.D.Pa. 1986), and is reprinted in the appendix at p. A-24, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1988; a timely petition for rehearing was denied on April 25, 1988.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED ARE SET FORTH IN THE APPENDIX

U.S. Const. Amend V.

Section 110(a) of the Clean Air Act, 42 U.S.C. § 7410(a)

Section 304 of the Clean Air Act, 42 U.S.C. § 7604

50 Fed. Reg. 32451

51 Fed. Reg. 18438

Pennsylvania Air Pollution Control Act 35 P.S. § 4010(f)

Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. 8541 *et seq.*

STATEMENT OF CASE

Respondents, on January 3, 1985, initiated this action in the District Court solely on the basis of the citizen suit enforcement provisions of the Clean Air Act, 42 U.S.C. § 7604, p. A-47, *infra* to enforce the odor regulations which had been inadvertently approved by the United States Environmental Protection Agency ("EPA") for inclusion in the Pennsylvania State Implementation Plan ("SIP"). An amended complaint was filed on April 12, 1985, naming additional individuals as plaintiffs and correcting certain statutory citations. Both of these complaints are entitled "Citizen Lawsuit Complaint To Enforce Clean Air Act, 42 U.S.C. § 7401 *et seq*, In respect to the City of Philadelphia's Northeast Water Pollution Control Plant." The latter complaint merely added the word "Amended" to its title. At the oral argument held on respondents' motion for summary judgment, their counsel characterized the amended complaint as follows:

> Mr. Balter:
>
> This is a citizen lawsuit enforcement action to enforce the odor regulation in the Pennsylvania State Implementation Plan, a regulation under the Clean Air Act. The Citizen lawsuit is brought pursuant to section three zero four, [42 U.S.C. § 7604].

[Tr. Sept. 16, 1985 at 4].

The graveman of the two complaints was that the Northeast Water Pollution Control Plant ("the Plant"), which treats raw sewage prior to its discharge in the Delaware River, was emitting odors into the community adjacent to the Plant.

As an initial matter, petitioners raised the question of the District Court's jurisdiction over the subject matter of this action by means of a motion to dismiss the complaint, which motion was filed on January 31, 1985. The basis for the claim of lack of subject matter jurisdiction was premised upon the lack of the Congressionally-mandated nexus between the odor regulations and the national ambient air quality standards; that they had been improperly and inadvertently included in

the SIP; and that such inclusion, which contravened the Congressional mandate set forth in Section 110(a) of the Clean Air Act, 42 U.S.C. § 7410(a), was a nullity. Petitioners documented this position by producing to the District Court a copy of a letter dated April 1, 1983 from EPA to the Pennsylvania Department of Environmental Resources ("DER"), in which EPA advised DER that:

> Although EPA initially approved the odor regulations in 1972 as part of the basic SIP, this was an error. EPA does not have the authority to enforce odor regulations and we do not anticipate receiving such authority from Congress in the foreseeable future. Because of this, we have not and will not enforce the existing odor regulations.

[Exhibit "A" to Defendants' Reply to Plaintiffs' Memorandum In Opposition to Motion to Dismiss].

In light of the City's motion to dismiss, the trial court on February 19, 1985 issued an order that requested EPA to file an *amicus curiae* brief on this issue. On March 20, 1985, EPA did file an *amicus curiae* brief in which it acknowledged that Section 110(a)(2) of the Clean Air Act required EPA to approve as part of SIPs only those provisions which significantly contribute to the attainment and maintenance of the national ambient air quality standards ("NAAQS") and that the odor emission regulations bore no such relationship to the NAAQS. The agency also advised the court that:

> EPA recognizes the problem raised by its approval of the state odor emission regulations. In reviewing SIPs, EPA is governed by the criteria in section 110(a)(2) of the Clean Air Act, which requires measures for the attainment and maintenance of the primary and secondary NAAQS. In order for EPA to approve a state rule as part of the SIP, the rule must significantly control emissions that contribute, directly or indirectly to concentrations of pollutants for which a NAAQS has been established. Yet the City of Philadelphia points out here, and EPA agrees, that

> the state odor emission regulations bear no relationship to the attainment or maintenance of any NAAQS.

[p. A-63, *infra*]. EPA further advised the trial court of its intention to delete the odor emission regulations from the Pennsylvania SIP. [pp. A-63–A-64, *infra*].

The motion to dismiss for, *inter alia*, lack of subject matter jurisdiction was denied by order dated April 25, 1985, in which the District Court substituted its own independent assessment of the relationship between the odor regulations and the NAAQS for that of EPA: "[t]he odor emission regulations at issue are 'more stringent than those necessary to meet the minimal requirements of the primary and secondary ambient air quality standards' " [April 25, 1985 Order at p. 16]. The District Court then held that the City had failed to show that the odor emission regulations were wholly unrelated to the NAAQS:

> Defendant City's motion to dismiss fails for the same reason as that articulated above. In order for the odor emission regulations not to be related in any way to the implementation of the ambient air quality standards, the City must show that odor emissions are wholly unrelated to the emission of any pollutants for which there are ambient air quality standards. Defendants have failed to show that the "malodorous air contaminants" proscribed in the state odor emission regulations, which are part of the SIP, are "wholly unrelated" to the emission of any "air pollutants" proscribed by the CAA [Clean Air Act].

[*Id.* at p. 18]

On August 12, 1985, EPA published in the Federal Register notice of its intent to delete the odor emission regulations from the Pennsylvania SIP. [p. A-73, *infra*]. An extended sixty-day public comment period was held.

Expressly because of the imminence of EPA's Final Rule deleting the odor emission regulations from the Pennsylvania SIP, respondents moved on March 21, 1986, to amend their complaint for a second time to include the organic solvent

provisions of Philadelphia Air Management Regulation V, Section X. The expressed purpose of this proposed amendment was so that the trial court might retain jurisdiction over the action.

Petitioners and defendant-intervenors opposed the motion on, among other grounds, that to allow such amendment would prove futile as the organic solvent regulations were not applicable to wastewater treatment plants and that the motion was not made in good faith because it was an attempt to manufacture federal jurisdiction in the absence of any legal foundation.

On April 22, 1986, the District Court, despite being "inclined to agree with defendants' interpretation [of the inapplicability] of the regulation," granted Appellees' motion to amend. However, no such amended complaint was ever filed.

The Final Rule, deleting the Pennsylvania SIP, was signed on Friday, May 2, 1986 by Lee M. Thomas, EPA's Administrator, and was published in the Federal Register on May 20, 1986 [p. A-77, *infra*].

In that document EPA reiterated its position that there was no direct or indirect relationship between the odor emission regulations and the criteria pollutants for which NAAQS had been established. [p. A-77, *infra*]. EPA further characterized the Final Rule as "corrective action . . . to remedy an oversight in inadvertently approving the odor regulations." [p. A-82, *infra*].

Immediately, upon receipt of notice of the May 2, 1986 signing of the Final Rule, counsel for petitioners advised the District Court as well as respondents' counsel of her intent to file on May 5, 1986 before trial was scheduled to commence a summary judgment motion, premised on the lack of subject matter jurisdiction. Said motion was filed on May 5, 1986. At that time, the trial judge, the Honorable Donald W. VanArtsdalen acknowledged that he did not believe that he could grant relief under the federal Clean Air Act. [Tr. May 5, 1986 at p. 1-22]. Subsequently, respondents' counsel asserted for the first time—in direct contravention of what he had advised the trial court and all other counsel in September 1985 [Tr.

May 5, 1986 at p. 1-19]—that respondents had included in their amended complaint a pendent state law claim. [Tr. May 5, 1986 at pp. 1-13—1-17]. Thus, on May 5, 1986, just prior to commencement of trial, respondents' counsel for the first time advised the trial court and all other parties to the litigation that it had asserted claims under the citizen suit provision of Pennsylvania Air Pollution Control Act, 35 P.S. § 4010(f).

Over the objection of petitioners and the two defendant-intervenors, the District Court proceeded to preside over the merits trial, even though the District Court had acknowledged that no relief could be granted under the Clean Air Act. One can only assume that the court permitted respondents to present their case-in-chief under the mistaken assumption that the amended complaint could be maintained under the Pennsylvania Air Pollution Control Act. As the petitioners had had no prior notice of a pendent state claim either statutory or common law—prior to the commencement of the trial—it was not until the close of respondents' case-in-chief that petitioners' counsel was able to advise the District Court of respondents' failure to comply with the jurisdictional prerequisite for the maintenance of a citizen enforcement action under the state act. The trial court was advised that Section 4010(f) of the Pennsylvania Air Pollution Control Act, 35 P.S. § 4010(f), required respondents to give the Attorney General thirty days' notice prior to the commencement of any action under the state act.

Even after this issue of the failure to meet this jurisdictional prerequisite under the Pennsylvania Air Pollution Control Act had been raised before the District Court and the renewal of the City's May 5, 1986 summary judgment motion, the trial proceedings continued to completion.

In the Order dated July 25, 1986 and entered by the clerk on July 28, 1986, the District Court held that respondents could not maintain this action under the Pennsylvania Air Pollution Control Act as they had failed to satisfy jurisdictional prerequisite of Section 4010(f) of said Act. [p. A-49, *infra*]. However, the trial court, *sua sponte*, asserted its juris-

diction over the underlying litigation on the basis of common law nuisance. [pp. A-50–A-51, *infra*].

The July 25, 1986 Order enjoined the City from operating the Northeast Water Pollution Control Plant ("the Plant") in violation of the Pennsylvania Air Pollution Control Act, 35 P.S. §§ 4001 *et seq.*, and the Philadelphia Air Management Code, 3 Philadelphia Code §§ 101 *et seq.* In addition, the Court ordered the Plant to be operated and maintained so as not to cause any malodor of such intensity, quantity and concentration as unreasonably to cause, injury, harm, annoyance and discomfort to persons of normal sensibilities. [p. A-56, *infra*].

On October 14, 1986, respondents moved to have the petitioners held in contempt of the July 25, 1986 Order. Petitioners denied that they were in contempt of the trial court's order on the grounds that the majority of odors complained of were from barely detectable to light and mild in intensity and were odors incidental to any well-operated and well-maintained plant; and that odors which were strong were attributable to reasons beyond the control of the Petitioners, *e.g.*, the occurrence of a natural phenomenon, Nocardia, which industry experts have not found a means of preventing; the failure of the independent sludge dewatering contractor's equipment; and other equipment failure. Petitioners also maintained that with respect to five alleged odor events, there were no malodors emitted from the Plant.

During the contempt hearing, which commenced December 1, 1986, the City again moved to dismiss the underlying complaint due to lack of subject matter jurisdiction. [Tr. December 1, 1986 at p. 10]. The trial court declared the motion to be a continuing one and denied it. [Tr. Dec. 1, 1986 pp. 10-11].

By order dated January 28, 1987, the District Court held petitioners in contempt of the July 25, 1986 Order. [p. A-21; *infra*]. The January 28, 1986 Order requires the City, *inter alia*, to pay Ten Thousand Dollars ($10,000.00) to the Court upon the occurrence of the issuance of three (3) notices of violation of the Pennsylvania Air Pollution Control Act and/or

the Philadelphia Air Management Code. The money is to be used expressly to compensate parties who have suffered damages attributable to the violation of the state statute or the local ordinance. [p. A-22 *infra*].

The terms of the July 25, 1986 Order were expressly continued in paragraph 4 of the January 28, 1987 Order. [p. A-23, *infra*].

A timely notice of appeal from the January 28, 1987 Order was filed on February 23, 1987. Oral argument was held before the Third Circuit panel on October 20, 1987. The Third Circuit affirmed the District Court's opinion on March 31, 1988. A timely petition for rehearing was denied on April 25, 1988.

REASONS WHY A WRIT SHOULD BE GRANTED

Questions of fundamental importance to the precept that federal courts are courts of limited jurisdiction are presented in this case, including:

1. when is a federal claim so insubstantial or frivolous as to warrant dismissal for want of subject matter jurisdiction;

2. when is a federal claim so insubstantial that there exists no power to exercise pendent jurisdiction;

3. when is a federal court deprived of the power to exercise pendent jurisdiction because Congress in the Clean Air Act has, at least by implication, negated such power (the Second Circuit and the Third Circuit are in apparent conflict on the issue);

4. when, consistent with the Due Process Clause of the Fifth Amendment, can a trial court of its own volition assert a pendent state claim (the Third Circuit and the Fifth Circuit are in conflict on this issue); and

5. when can a court presiding over a state claim ignore the statutory law of that state.

This case also presents for resolution the conflict between the Third Circuit and the Seventh Circuit as to whether individuals can institute suit in federal court, under the citizen enforcement provisions of the Clean Air Act, for alleged violations of provisions that are admitted to be invalid by EPA but which have not yet been repealed. Included in the question is whether the Fifth Amendment permits a municipal government to be prosecuted in federal court for violation of an administrative action that the administrative agency itself acknowledges was beyond its statutory mandate.

In order to resolve these fundamental constitutional and statutory questions, the Writ of Certiorari should be granted.

I. There Exists A Conflict Between The Third And Seventh Circuits As To Whether Private Plaintiffs Under The Clean Air Act Can Sue Under SIP Provisions That Are Nullities

This Court has repeatedly held that, if an Executive

Agency acts inconsistently with the statutory mandate of Congress, that action is a nullity.

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is . . .[only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134, 56 S. Ct. 397, 400, 80 L.Ed. 528 (1936). *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-214, 96 S. Ct. 1375, 1391, 47 L.Ed2d 668 (1976); *Dixon v. United States*, 381 U.S. 68, 74, 85 S. Ct. 1301, 1305, 14 L.Ed. 2d 223 (1965).

United States v. Larionoff, 431 U.S. 864, 873 n.12 (1977).

A nullity has absolutely no effect at law (*Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) and may not be the basis for a federal prosecution. *See e.g., Adamo Wrecking Co. v. United States*, 395 U.S. 185 (1969), and *McKart v. United States*, 395 U.S. 185 (1969). Thus, enforcement in a federal court of an administrative action that represents a nullity violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

EPA, the agency charged by Congress with the implementation of the Clean Air Act, has since at least as early as 1981[1] taken the position that the odor regulations could not be approved for inclusion in the Pennsylvania SIP as such approval exceeded its statutory mandate: In 1981, EPA in re-

1. Moreover, in May 1981, without public comment, EPA refused to approve odor control regulations which had been submitted by Guam for inclusion in its SIP on the ground that "they are not specifically directed at the NAAQS." 46 Fed. Reg. 26,303 (May 12, 1981). Similarly, in August 1981, again without public comment, EPA refused to approve odor control provisions for the Nevada SIP on the ground that "they are not appropriate for incorporation into the SIP." 46 Fed. Reg. 43, 141 (Aug. 27, 1981). Likewise, in May 1982, EPA refused to approve in the Iowa SIP regulations controlling odors "for which EPA has not adopted standards and does not require control." 47 Fed. Reg. 22,531 (May 25, 1982).

viewing Allegheny County's submission for inclusion in the Pennsylvania SIP refused to approve that county's odor regulations as part of the SIP:

> EPA does not have the authority to enforce odor regulations [§ 404 of the County's Regulations]. Therefore, they are not being approved as part of the SIP.

46 *Fed. Reg.* 51610 (October 21, 1981) [Memorandum of Law In Support of Motion to Dismiss pp. 8-9, and Exhibit "B" attached thereto]. Consistent with that position EPA advised the Pennsylvania Department of Environmental Resources ("DER") that any prior approvals of odor regulations for inclusion in the Pennsylvania SIP had been inadvertent and had exceeded the mandate set forth in Section 110(a) of the Clean Air Act, 42 U.S.C. § 7410(a). Thus, they were not enforceable:

> Although EPA initially approved the odor regulations in 1972 as part of the basic SIP, this was an error. EPA does not have the authority to enforce odor regulations and we do not anticipate receiving such authority from Congress in the foreseeable future. Because of this, we have not and will not enforce the existing odor regulations.

Letter, dated April 1, 1983 from EPA to the Pennsylvania Department of Environmental Resources. [Exhibit "A" to Defendants' Reply to Plaintiffs' Memorandum In Opposition to Motion to Dismiss].

In its *amicus curiae* brief before the District Court, EPA once again confirmed that its approval of the odor regulations as part of the Pennsylvania SIP conflicted with its statutory mandate:

> EPA recognizes the problem raised by its approval of the state odor emission regulations. In reviewing SIPs, EPA is governed by the criteria in section 110(a)(2) of the Clean Air Act, which requires measures for the attainment and maintenance of the primary and secondary NAAQS. In order for EPA to approve a state rule as part of the SIP, the rule must significantly control emissions that

> contribute, directly or indirectly, to concentrations of pollutants for which a NAAQS has been established. Yet the City of Philadelphia points out here, and EPA agrees, that the state odor emission regulations bear no relationship to the attainment or maintenance of any NAAQS.

[p. A-63, *infra*].

In its Final Rule EPA reiterated the requisite statutory nexus for approval of state and local measures as part of a federally enforceable SIP:

> In reviewing SIPs, EPA is governed by the criteria in Section 110(a)(2) of the Clean Air Act, which require measures for the attainment and maintenance of the primary and secondary NAAQS. In order for EPA to properly approve a State rule as part of the SIP, the rule must have a significant relationship to attainment and maintenance of a NAAQ.

[p. A-78, *infra*]. Moreover, EPA also acknowledged in its Final Rule that its action in deleting the odor regulations from the Pennsylvania SIP was merely corrective action since EPA had never found the requisite relationship between odors and any NAAQs:

> EPA is merely taking corrective action here to remedy an oversight in inadvertently approving the odor regulations. The Agency has *never found* any significant relationship between the control of odors and any NAAQS.

[p. A-82, *infra*].

Without addressing the question of whether administrative actions that exceed the statutory mandate, *i.e.*, nullities, could provide the basis for federal subject matter jurisdiction, the Third Circuit held that since the deletion of the odor regulations was procedurally defective, said regulations remained a part of the SIP. And, thus the "Citizens complaint alleged a cognizable federal claim under the Pennsylvania SIP." [p. A-7, *infra*].[2]

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2. The deletion of the odor regulations was held procedurally defective

In marked contrast, is the Seventh Circuit's decision in *Sierra Club v. Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (7th Cir. 1983), where the plaintiffs sought to enforce provisions of the Indiana SIP which had been declared invalid by a state court, but not administratively repealed. The *Sierra Club* court held the invalid portions of the SIP to be unenforceable, stating:

> The proceeding before the Indiana courts was not a revision or modification of a plan. Modification or revision of a [SIP] plan assumes the existence of a valid plan in the first place. The Indiana Court ruled that a valid plan never existed, for there were procedural defects which invalidated the plan at its inception.

Id. at 1151. "'It would be an anomaly, if not a denial of the defendant's due process rights to allow . . . full enforcement of those invalid regulations'" *Sierra Club*, 716 F.2d 1151, quoting *People v. Celotex Corp.*, 516 F. Supp. 716 (C.D. Ill. 1981).

Thus, the decision to grant the requested writ would resolve a conflict among the circuits with respect to whether private citizens may enforce in federal court, SIP provisions that are nullities that have not been administratively appealed.

Moreover, a grant of a writ of certiorari would clarify the respective roles of EPA and private citizens in the enforcement of the Clean Air Act. The decision below produces a quixotic anomaly: private citizens are granted more authority to enforce air pollution control laws under the federal Clean Air Act than the administrative agency charged with that responsibility by Congress may enforce merely because of a mistake of the regulatory agency itself.[3]

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in *Concerned Citizens of Bridesburg v. United States Environmental Protection Agency*, 836 F.2d 777 (3d Cir. 1987), which opinion is reproduced in its entirety in the appendix hereto at p. A-96, *infra*. The Third Circuit had reached this conclusion by characterizing the deletion as a revision to the SIP, necessitating a public hearing, rather than a correction of a mistake that was within EPA's inherent power. *See, e.g., American Trucking Assoc. v. Frisco*, 358 U.S. 133 (1953); and *Dixon v. United States*, 381 U.S. 68 (1965).

3. It is a well-established principle of statutory construction that a statute should not be construed in a manner which leads to absurd results. *United States v. Turkette*, 452 U.S. 576 (1981).

II. The Decision Below Violates The Basic Principle That Federal Courts Are Courts Of Limited Jurisdiction[4]

"It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or Congress, must be neither disregarded nor evaded." *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 374-375 (1978).

An inadvertent administrative act, which has been, since at least as early as 1981, acknowledged to be in conflict with the statutory mandate, cannot enlarge the District Court's subject matter jurisdiction. An agency of the Executive Branch cannot use its delegated authority to confer or alter the jurisdiction of the federal courts:

> A grant of rulemaking power is not authority to create federal jurisdiction. That authority lies solely with Congress.

Marshall v. Gibson's Products, Inc., 584 F.2d 668, 677 (5th Cir. 1978) (footnote omitted); accord, *Columbia Manufacturing Corp. V. National Labor Relations Board,* 715 F.2d 1409, (9th

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4. The Third Circuit has characterized petitioners' appeal of the question of subject matter jurisdiction as a collateral attack. [p. A-7 *infra*]. However, as this Court has construed contempt proceedings not to be an independent cause of action but part of the underlying action, *Leman v. Krenter-Arnold Hinge Last Co.*, 284 U.S. 448 (1931), any defense thereto or motions made therein are direct attacks. Secondly, for at least one hundred years, this Court has held that federal courts lacking jurisdiction to issue the underlying order also lack the ability to enforce that order by means of the contempt powers. *Ex parte Ayers,* 123 U.S. 445 (1887); *In re Sawyer* 124 U.S. 200 (1888); and *United States v. United Mine Workers of America,* 330 U.S. 258 (1947). Thirdly, at the commencement of the contempt hearing, petitioners made a F.R.Civ.P.60(b)(4) motion to dismiss the underlying complaint. An F.R.Civ.P.60(b)(4) motion represents a direct attack on a void judgment, *Watts v. Pickney,* 735 F.2d 406 (9th Cir. 1985). Fourthly, the January 28, 1987 Order, from which an appeal was taken, expressly continues provisions of the prior injunction issued on July 26, 1986. [p. A-23, *infra*]. The attack on the district court's subject matter jurisdiction was direct. Regardless, it is well-settled that subject matter jurisdiction is never waived. *See, e.g., Mansfield, Coldwater & Lake Michigan Ry. v. Swan,* 111 U.S. 379 (1884).

Cir. 1983) ("The authority to make rules of procedure relating to the exercise of jurisdiction is not an authority to enlarge that jurisdiction).

A. Congress by Implication Has Negated Pendent Jurisdiction For Odor Regulations

Moreover, this fundamental precept of limited jurisdiction further circumscribes a District Court's power to exercise its pendent jurisdiction, particularly in circumstances where Congress has expressly or by implication negated such exercise. *Aldinger v. Howard*, 427 U.S. 1 (1976).

In *Aldinger*, Chief Justice Rehnquist, writing for the Court, declared that the power to exercise pendent jurisdiction turns initially upon construction of the jurisdictional statute in question:

> But the question whether jurisdiction over the instant lawsuit extends not only to a related state-law claim, but to the defendant against whom that claim is made, turns initially, not on the general contours of the language in Art III, *i.e.*, "Cases . . . arising under," but upon the deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts.

Id. at 427 U.S. 16-17. "Before it can be concluded that . . . [pendent] jurisdiction exists, a federal court must satisfy itself not only that Art. III, permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." *Id.* at 427 U.S. 18.

Congress in Section 110(a) of the Clean Air Act, 42 U.S.C. § 7410(a), has expressly limited enforcement of state and local air pollution control measures under the federal Clean Air Act to those measures which significantly affect the attainment and maintenance of national ambient air quality standards. In so doing, Congress has negated, at least by implication, the federal court's authority to exercise pendent jurisdiction over those state and local air pollution control measures which lack this nexus to the national ambient air quality standards. Thus, by implication, Congress has ne-

gated the District Court's exercise of pendent jurisdiction over the odor regulations included in the Pennsylvania SIP.

Utilizing this precept of limited federal jurisdiction, the United States Court of Appeals for the Second Circuit in *United States v. North Hempstead*, 610 F.2d 1025 (2d Cir. 1979), *sua sponte*, examined the power of a trial court, which did possess federal subject matter jurisdiction over a claim under the Clean Air Act premised on other grounds, to exercise pendent jurisdiction over a state claim based on odors emitting from a municipal landfill. The Court concluded that subject-matter jurisdiction was lacking:

> No amount of talk can confer subject matter jurisdiction upon a federal court. Nor can subject matter jurisdiction arise from the circumstance that the exercise of such judicial power is desirable or expedient. And this is especially true where the case involves, as here, federal and state courts and administrative agencies with separate and clearly defined powers. The reason for this is that the case must relate to a "case or controversy" as provided in the Judicial Article of the Constitution and, as the District Courts are "inferior" courts, the "case or controversy" must be one over which the particular court is given *by Act of Congress* over the subject matter.

Id., 610 F.2d at 1025. In enacting the Clean Air Act, Congress conferred upon district courts the limited jurisdiction to enforce state and local air pollution measures that maintain or attain NAAQS but *not* the jurisdiction to enforce all other state and local odor regulations. Indeed, said pendent jurisdiction has been impliedly negated.

This apparent conflict between the Second and Third Circuits concerning whether the Clean Air Act vests district courts with the power to exercise pendent jurisdiction over claims arising under state odor regulations should be resolved by the issuance of a Writ of Certiorari.

B. As There Was No Substantial Federal Claim, The District Court Was Without Power Or Discretion To Exercise Pendent Jurisdiction

Likewise, the District Court was without power to exer-

cise pendent jurisdiction because there existed no substantial federal claim to which a state claim could be appended:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." U.S. Const., Art. III § 2 and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966) (emphasis in the original). Whether a claim is sufficiently substantial to confer the District Court with the power to exercise pendent jurisdiction depends on whether the court finds it to be so insubstantial or frivolous as to warrant dismissal for want of subject matter jurisdiction under F.R.Civ. 12(b)(1) (See, e.g., *Bell v. Hood*, 327 U.S. 678, 683 (1946)) or as to warrant dismissal under F.R.Civ.P. 12(b)(6) or disposal under F.R.Civ.P. 56. *See, e.g., Lechtner v. Brownyard*, 679 F.2d 322, 327-328 (3d Cir. 1982).

As stated above, the inclusion of odor regulations in the Pennsylvania SIP were beyond EPA's delegated authority and, as such, constituted a nullity. A nullity cannot serve as a basis for either a substantial federal claim or federal subject matter jurisdiction. Thus, as a matter of law, the trial court was without judicial power to exercise pendent jurisdiction.

Moreover, the guidelines set forth by this Court in *United Mine Workers v. Gibbs*, supra also demonstrate that even

if the District Court had the power to exercise pendent jurisdiction, it was an abuse of discretion to do so. Speaking for a unanimous Court, Justice Brennan announced that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* at 383 U.S. 726. In the case now under consideration, the District Court, prior to the commencement of trial, acknowledged belief that relief could not be afforded under the federal Clean Air Act. [Tr. May 1, 1986 at p. 1-22]. The trial commenced, presumably, under respondents' eleventh-hour assertion of a claim under the Pennsylvania Air Pollution Control Act.

Even if the state statutory claim had been viable, the directives set forth in *United Mine Workers v. Gibbs, supra,* would still mitigate against the exercise of pendent jurisdiction as state issues substantially predominated over federal issues:

> Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.

Id. at 383 U.S. 726-727.

III. The Trial Court's Sua Sponte Assertion Of Pendent Jurisdiction Two And One-Half Months After The Merits Trial Violates Not Only The Doctrines Of Judicial Self-Restraint And Pendent Jurisdiction But Also The Due Process Clause

Pendent jurisdiction, unlike subject matter jurisdiction cannot be raised at any stage of the litigation. *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 627 (1974). Indeed, "in determining whether jurisdiction over a nonfederal claim exists, the context in which the nonfederal claim is asserted is crucial." *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 375-376 (1978).

In the matter *sub judice,* the District Court in its July 26,

1986 decision on the merits, rendered more than two and one-half months after the trial, of its own volition, rewrote respondents' one-count complaint to include a common law nuisance count. The judicial redrafting occurred despite the District Court's characterization of this lawsuit just two weeks prior to the commencement of trial:

> Plaintiffs brought this suit on January 3, 1985, under 42 U.S.C. Section 7604 to enforce the provisions of the Clean Air Act, 42 U.S.C. Sections 7401-7626, against the defendants for their operation of the Northeast Water Pollution Control Plant (N/E WPCP), a sewage treatment plant. The plaintiffs alleged in their amended complaint [of April 11, 1985] that the defendants' operation of the N/E WPCP released noxious odors in the surrounding community in violation of nine sections of the Pennsylvania Air Management Code and its accompanying regulations which constitute part of Pennsylvania's State Implementation Plan (SIP) of the Clean Air Act that was approved by the Administrator of the United States Environmental Protection Agency and promulgated under 40 CFR 50.2020 *et seq.*, as required by 42 U.S.C. Section 7401.

[April 22, 1986 Opinion of the District Court at p. 1], and despite the District Court's acknowledgment at the commencement of the trial that "[i]t's true that in the so-called jurisdictional allegation [of the complaint] there is no claim for pendent State causes of action" [Tr. May 5, 1986 at p. 1-22]. Thus, this post-trial redrafting of the complaint by the District Court afforded petitioners no opportunity to defend themselves under this state law claim.

The Fifth Circuit, in contrast to the Third Circuit, has admonished such judicial conduct:

> The concept that a federal trial court may of its own volition, after trial, consider state law claims not pleaded by the plaintiffs does not appear constant with either doctrine [i.e., the exercise of pendent jurisdiction and the

> exercise of judicial self-restraint]. Not only does the court thus reshape the plaintiffs' suit, but it does so after trial when there is no opportunity to fashion proof or presentation directly to the state law issues.

Ruiz v. Estelle, 679 F.2d 1115, 1158 (5th Cir. 1982) *opinion amended in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). As counsel for respondents admitted at oral argument before the Third Circuit, petitioners did not have notice of any state law claims. This represents a violation of the petitioners' fundamental right to "notice" and "fairness" that is guaranteed by the Due Process Clause of the Fifth Amendment.

IV. The Imposition Of Fines To Compensate Respondents For Violations Of State And Local Regulations Contravenes State Law And Flagrantly Ignores The Erie Doctrine

Eric v. Tompkins, 304 U.S. 64 (1938) and its progeny have established that the source of the right sought to be vindicated—not the basis of subject matter jurisdiction—determines whether the state or federal law applies. *See e.g., Van Gemert v. Boeing Co.*, 553 F.2d 812 (2d Cir. 1977).

In the matter now before the Court, compensatory damages have been assessed against the petitioners without regard for the governmental immunity conferred upon them by the General Assembly of the Commonwealth of Pennsylvania in the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S. § 8541, *et seq.* The January 28, 1987 Order requires "the City of Philadelphia shall pay a coercive penalty of $10,000.00 *to be held for the benefit of persons injured or harmed by any violation of the injunction*, the distribution of such sums to be subject to further order of this court, to be determined by such further proceedings as may be required." [p. A21-22, *infra*]. Moreover, in its memorandum opinion which accompanied the said order, the District Court stated that these penalties would "be placed in a special fund to

compensate the named plaintiffs for the injury caused."[5] [p. A-19, *infra*]. However, the Pennsylvania General Assembly has granted political subdivisions of the Commonwealth, such as the City of Philadelphia, immunity from the assessment of such compensatory damages. In 1976, the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S. §§ 8541 *et seq.* ("Tort Claims Act")[6] was enacted by the General Assembly as a direct response to the judicial abrogation of the doctrine of governmental immunity in *Ayala v. Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877 (1973). *Carroll v. York*, 496 Pa. 363, 437 A.2d 394 (1981). "Pennsylvania, by passage of the Tort Claims Act, has generally retained sovereign immunity for its political subdivisions. This municipal immunity is waived for only eight types of negligence conduct." *Buskirk v. Seiple*, 560 F.Supp. 247, 252 (E.D. 1983). Specifically, Section 8541 of the Tort Claims Act provides:

> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by an act of the local agency or an employee thereof or any other person.

Those eight areas of government conduct which are excepted from the general grant of immunity are: (1) vehicle liability, (2) care, custody or control of personal property, (3) real property, (4) trees, traffic controls and street lighting, (5) utility service facilities, (6) streets, (7) sidewalks, and (8) care, custody or control of animals. *Id.* § 8542(b). "Claims which are not governed in one of these specific areas of liability are barred by the retention of governmental immu-

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5. In disregard of Due Process considerations of the Fifth Amendment to the United States Constitution, the compensatory penalties assessed against the City of Philadelphia were made without any showing of actual harm: Indeed, the District Court found that "there has been no showing, by way of affidavits or other competent evidence, of any actual monetary loss or damages suffered by the plaintiffs due to the continuing violations." [p. A-20, *infra*].

6. A copy of the Tort Claims Act in its entirety is included in the appendix hereto at pp. A-88, infra.

nity." *Lopuszanski v. Fabey*, 560 F. Supp. 3, 5-6 (E.D. Pa. 1982).

The conduct complained of by respondents does not fall within the scope of the Tort Claims Act for three reasons: First, respondents could not recover damages under either the Pennsylvania Air Pollution Control Act, 35 P.S. § 4001 *et seq.*, or the Philadelphia Air Management Code. Second, the Commonwealth of Pennsylvania has limited petitioners liability for damages to those injuries caused by negligent acts. Third, the governmental conduct complained of does not fall into one of the eight narrow exceptions to immunity. Thus, under Pennsylvania Law, respondents cannot be compensated for any injuries they may have sustained because of violations of state and local odor regulations.

Under *Erie* and its progeny, the District Court must abide by Pennsylvania Tort Claims Act where the rights sought to be vindicated arise under state law.

CONCLUSION

For the reasons set forth above, Petitioners respectfully pray for a Writ of Certiorari to issue to the United States Court of Appeals for the Third Circuit to review the opinion and decision of that court.

Respectfully submitted,

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